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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 QWEST CORPORATION, a Colorado
10 corporation,

11 Plaintiff,

12 v.

13 ANOVIAN, INC., et al.,

14 Defendants.

CASE NO. C08-1715 RSM

ORDER GRANTING DEFENDANT
TRANSCOM'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

15 This matter is now before the Court for consideration of defendant Transcom's Rule 12 (b)(2),
16 (3), and (6) motion to dismiss. Dkt. # 47. The motion asserts numerous bases for dismissal: lack of
17 personal jurisdiction; improper venue, or in the alternative, to transfer venue; and failure to state a claim
18 upon which relief can be granted. Defendant also moves, in the alternative, for a definite statement
19 pursuant to Rule 12(e). The Court has considered the pleadings, the memoranda of the parties, and the
20 declarations submitted. For the reasons set forth below, the Court does not reach all of the issues
21 presented because the Court finds that it does not have personal jurisdiction over the defendant.

22 FACTUAL BACKGROUND

23 This matter arises out of Qwest Corporation's allegations that defendants Anovian, Broadvox,
24 Transcom, and UniPoint failed to pay legally required charges (access charges) for their use of Qwest's
25 services in completing long-distance telephone calls. Qwest alleges that the defendants are liable for
26 these charges because they "act as" interexchange carriers within the meaning of 47 C.F.R. § 69.5(b),
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1 which assesses access charges “upon all interexchange carriers that use local exchange switching
2 facilities” in providing interstate telecommunications services.

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4 Defendants Transcom Holdings, Inc. (“Transcom Holdings”) and Transcom Enhanced Services,
5 Inc. (“Transcom Enhanced Services”) (collectively, “Transcom”) are providers involved in the
6 telecommunications industry that participate, through the use of new Internet technology, in the routing
7 of telephone calls, some of which originate or terminate in Washington. Prior to June 16, 2006,
8 Transcom Enhanced Services was a Texas company in which Transcom Holdings owned a minority of
9 the equity. However, Transcom Enhanced Services filed for protection under Chapter 11 of the
10 Bankruptcy Code in February 2005, and its reorganization plan went into effect on June 16, 2006. In
11 accordance with the plan, all equity interests that Transcom Holdings held in Transcom Enhanced
12 Services were canceled. Thus, since June 16, 2006, Transcom Holdings has existed as only a shell, with
13 no actual activities. Even prior to that date, Transcom Holdings’ only activities other than owning
14 equity were providing some back-office services for subsidiaries and affiliates. All of Transcom
15 Holdings’ activities took place in Texas.

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18 Transcom has its principal place of business and its corporate office in Dallas-Fort Worth, Texas.
19 Neither Transcom Enhanced Services nor Transcom Holdings has ever had any offices, employees,
20 property, or operations in Washington. Neither is registered to do business in Washington, neither has a
21 registered agent for service of process here, and neither has had any contractual relationships with
22 entities located in Washington since the filing date of the Complaint.

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25 Qwest provides local and long-distance telephone service to customers in many states, including
26 Washington. Generally speaking, long-distance carriers, or interexchange carriers, rely on companies
27 like Qwest to originate or terminate long-distance calls at the consumer level. Such interexchange
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1 carriers are charged access charges for the use of Qwest's services in traditional wireline long-distance
2 service. However, the emergence of a new Internet technology—"IP telephony"—has allowed
3 Transcom and similar companies to provide communications services over the Internet, not using
4 traditional wireline technology. The defendant does not deal directly with Qwest and instead routes
5 calls to another provider, which then routes the calls to Qwest for termination.
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7 ANALYSIS

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9 Personal jurisdiction may be grounded in either general jurisdiction, when a defendant is either
10 domiciled in or conducts "substantial" or "continuous and systematic" activities in the forum state, or
11 specific jurisdiction, derived from a defendant's individual acts with respect to the allegations of a
12 complaint. *Panavision Int'l v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (citing *Helicopteros*
13 *Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414–16 (1984)). Qwest's theory of jurisdiction in
14 this matter is one of specific not general jurisdiction. "Washington's long-arm statute establishes
15 personal jurisdiction over a foreign party to the full extent permitted by due process." *Corbis Corp. v.*
16 *Integrity Wealth Management, Inc.* Slip Copy, 2009 WL 2486163 (W.D. Wash.) (citing *Byron Nelson*
17 *Co. v. Orchard Management Corp.*, 95 Wash. App. 462, 465 (1999)). The statute provides for specific
18 personal jurisdiction over non-resident defendants for matters arising out of, among other things, the
19 transaction of business within the state, the commission of a tortious act within the state, or the
20 ownership, use, or possession of any property within the state. Wash. Rev. Code § 4.28.185(a)–(c). The
21 Due Process Clause restricts findings of personal jurisdiction to those cases in which nonresident
22 "defendants have 'minimum contacts' with the forum state so that the exercise of jurisdiction 'does not
23 offend traditional notions of fair play and substantial justice.'" *Roth v. Garcia Marquez*, 942 F.2d 617,
24 620 (9th Cir. 1991) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
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1 To analyze whether the “minimum contacts” requirement is met, the Ninth Circuit has
2 established a three-part test: “(1) the nonresident defendant must have *purposefully availed* himself of
3 the privilege of conducting activities in the forum by some affirmative act or conduct; (2) plaintiff’s
4 claim must *arise out of* or result from the defendant’s forum-related activities; and (3) exercise of
5 jurisdiction must be *reasonable*.” *Id.* at 620–21.
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7 To meet the purposeful availment requirement under the first prong of the test, “the defendant
8 must have performed some type of affirmative conduct which allows or promotes the transaction of
9 business within the forum state.” *Id.* at 621 (*citing Sinatra v. National Enquirer*, 854 F.2d 1191, 1195
10 (9th Cir. 1988)). Courts distinguish between contract and tort actions in analyzing this requirement.
11 While for suits concerning contracts, courts typically use a purposeful availment analysis, for suits
12 grounded in tort, courts most often use a purposeful direction analysis. *Schwarzenegger v. Fred Martin*
13 *Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2002). As this is a tort action, the Court will employ a
14 purposeful direction analysis.
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17 A showing of purposeful direction “usually consists of evidence of the defendant’s actions
18 outside the forum state that are directed at the forum, such as the distribution in the forum state of goods
19 originating elsewhere.” *Id.* at 803. A defendant need not have physical contacts with the forum state.
20 *Id.* Courts use a three-part “effects” test in determining whether a plaintiff has satisfied the purposeful
21 direction element of personal jurisdiction. The “effects” test “requires that the defendant allegedly have
22 (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the
23 defendant knows is likely to be suffered in the forum state.” *Id.* (explaining the test set out in *Calder v.*
24 *Jones*, 465 U.S. 783 (1984)).
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1 The plaintiff has the burden of proving the first two prongs of the Ninth Circuit's test. However,
2 showing that the exercise of personal jurisdiction offends traditional notions of fair play and substantial
3 justice falls on the defendant's shoulders: "[w]here a defendant who purposefully has directed his
4 activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the
5 presence of some other considerations would render jurisdiction unreasonable." *Panavision*, 141 F.3d at
6 1322 (citing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1486 (9th Cir. 1993)). If a court
7 decides that a defendant's activities satisfy the first two prongs of the Ninth Circuit's test, it will then
8 consider seven factors to determine the reasonableness of exercising personal jurisdiction over that
9 defendant:
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12 (1) the extent of a defendant's purposeful interjection; (2) the burden on the defendant in
13 defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's
14 state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient
15 judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's
16 interest in convenient and effective relief; and (7) the existence of an alternative forum.

17 *Id.* at 1323 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985)). In weighing these
18 factors, the courts find no single factor dispositive. *Id.*

19 Qwest has not met its burden to show that Transcom has purposefully directed activities at
20 Washington. Under the effects test, even if it were true that Transcom committed an intentional act in
21 allowing certain telephone calls that originated or terminated in Washington to pass through Transcom's
22 system, the acts must still be expressly aimed at Washington and must cause harm that Transcom knew
23 was likely to be suffered in Washington.
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25 Documents filed by defendant Transcom demonstrate that Transcom merely performs a service
26 for calls that are routed over Qwest's network by a third party, Electric Lightwave, Inc. Transcom does
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1 not itself make the decision regarding where calls will originate or terminate, and the circuits over which
2 the calls are routed to Qwest are operated by Electric Lightwave, Inc., not Transcom. Moreover, it was
3 Electric Lightwave, Inc.'s independent decision to route the traffic in question over Qwest's network, as
4 opposed to that of another carrier. Even if Transcom's business with Electric Lightwave, Inc. were to
5 constitute express acts aimed at Washington, it is unlikely that Transcom was aware that any resulting
6 harm was likely to be suffered in Washington, particularly considering the fact that Qwest is based in
7 Colorado, not Washington.
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10 Further, even if Transcom had purposefully directed activities at Washington, and even if
11 Transcom's purchase of services from Electric Lightwave, Inc.—a Washington-based company—was
12 the act from which Qwest's claim arose, the reasonableness prong of the personal jurisdiction test is still
13 not met. The *Schwarzenegger* case makes it clear that physical contact with Washington is not a
14 prerequisite to a finding of personal jurisdiction. However, it is relevant to an assessment of the
15 reasonableness factor of minimum contacts with a forum state. Analysis of the seven factors that the
16 courts consider in assessing reasonableness reveals what would be a difficult burden on Transcom if it
17 was forced to defend this case here.
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20 First, an alternative forum for the case exists: Texas. Even without regard for the other
21 defendants, whose principal places of business are also in Texas, all of Transcom's operations, records,
22 and employees are located in Texas. Jurisdiction there would thus be proper and would promote judicial
23 efficiency. Moreover, because Transcom operates in Texas and not in Washington, its burden would be
24 high if it was forced to defend the case in Washington. Transcom has no ties to Washington other than
25 its decision to purchase services from a company that used Washington-based circuits to route a portion
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1 of its traffic to Qwest. All of the defendant's operations are based in Texas, and none are based in
2 Washington.

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4 If Transcom's contacts with Washington were significantly stronger, it might warrant causing
5 the defendant to incur substantial costs for travel and employee time. However, even if the Court could
6 find that Transcom purposefully directed business at the state of Washington, the extent of its purposeful
7 interjection was very limited. Transcom's industry is one of complex communications, transferred
8 through various technologies by multiple intermediaries in different locations as calls move from caller
9 to recipient. It would offend "traditional notions of fair play and substantial justice" to require
10 Transcom to defend itself in any given forum around the world in which it has so few business ties and
11 no physical presence.
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13 14 CONCLUSION

15 The Court has found neither that Transcom purposefully directed its activities at Washington,
16 nor a cause of action arising out of Transcom's activities in Washington, such that exercise of
17 jurisdiction over Transcom would be reasonable. Therefore, the Court concludes that it does not have
18 personal jurisdiction over Transcom. Accordingly, defendant's Rule 12(b)(2) motion to dismiss is
19 GRANTED, and this action is DISMISSED for lack of jurisdiction. The Clerk shall enter judgment
20 accordingly.
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23 DATED this 16th day of December, 2009.
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27 RICARDO S. MARTINEZ
28 UNITED STATES DISTRICT JUDGE_